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No. 08-1188

Supreme Court, U.S.
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In The

Supreme Court of the United States

GERALD ROBINSON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Ohio, Lucas County

REPLY TO BRIEF IN OPPOSITION

RICHARD M. KERGER
33 S. Michigan St.
Suite 100
Toledo, Ohio 43604
419.255.5990

JOHN P. DONAHUE
Counsel of Record
Post Office Box 526
Perrysburg, Ohio 43552
419.874.4604

Counsel for Petitioner Gerald Robinson

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply 1

A. Father Robinson's due process claim is properly before this Court 3

B. Constitutional prejudice is manifest when the passage of time and the consequent loss of exculpatory evidence contribute to a conviction 5

1. The State's Brief in Opposition misinterprets the harmless error standard..... 6

2. The lost or destroyed evidence in this case significantly contributed to Father Robinson's conviction 7

C. This record provides the Court with an opportunity to establish a meaningful constitutional standard..... 10

Conclusion..... 11

TABLE OF AUTHORITIES

Page

CASES

Baldwin v. Reese, 541 U.S. 27 (2004).....4

Chapman v. California, 386 U.S. 18 (1967) 6

Crane v. Kentucky, 476 U.S. 683 (1986).....6

Crawford v. Washington, 541 U.S. 36 (2004).....9

Howell v. Mississippi, 543 U.S. 440 (2005).....4

Melendez-Diaz v. Massachusetts, 557 U.S. ___ (2009).....9

Michigan v. Long, 463 U.S. 1032 (1983).....5

United States v. Graham, 128 F.3d 372 (1997).....9

United States v. Lovasco, 431 U.S. 783 (1977)....*passim*

United States v. Marion, 404 U.S. 307 (1971) 2

Yates v. Evatt, 500 U.S. 391 (1991) 6, 7

REPLY

The question presented in this case is straightforward: when does an accused suffer "actual prejudice" under the first prong of the test announced in *United States v. Lovasco*, 431 U.S. 783 (1977). In his opening papers, petitioner, Father Gerald Robinson, demonstrated that the lower federal and state courts cannot agree on the meaning of *Lovasco's* "actual prejudice" terms, and cannot agree on the burden of production and quantum of proof required to meet that constitutional threshold. *See*, Pet. at pp. 22-28. Thus, because the question presented has not been, but should be, settled by this Court, our Petition urges the Court to grant certiorari and clarify the meaning and parameters of the *Lovasco* standard.

In response to petitioner's actual prejudice certworthiness argument, the State embarks on a remarkable litigation strategy – it simply ignores it. Indeed, the Brief in Opposition does not even mention, let alone discuss, or distinguish any of petitioner's authority. Rather than grapple with the deep divide amongst the lower courts on the meaning of the terms "actual prejudice," the State characterizes petitioner's request for clarification of *Lovasco* as "disagreement" with *Lovasco*, and then re-casts that clarification request as one to "re-write" *Lovasco* and as an "attack" on *Lovasco*. *See*, Br. in Opp. at p. 1, p. 18.

None of these claims are true. The State cannot, and does not, contest our initial observation that the

parameters of a due process pre-prosecution delay claim are ill-defined. *See*, Pet. at pp. 22-28. And the State does not contest the fact that many *Lovasco* cases with similar facts produce inconsistent results. *Id.* Petitioner is asking this Court to clarify how a defendant alleging actual prejudice demonstrates that the prejudice suffered is not speculative, so that the lower courts can determine, based on "the circumstances of each case," whether the defendant has met that burden. Petitioner is not, as the State suggests, asking this Court to articulate a wide-sweeping, all-encompassing "inflexible rule" that is impractical for lower courts to apply. Simply put, clarification of the actual prejudice standard will guide and not foreclose lower courts from applying the case-by-case approach envisioned by *Lovasco*. To suggest otherwise. ignores the very nature of the due process inquiry.

Next, the Brief in Opposition does not quarrel with petitioner's claim that there is no constitutional remedy in the majority of the circuits in the absence of proof of prosecutorial misconduct. *See*, Pet. at pp. 20-21. But rather than address the cert-worthiness of this longstanding split of circuit court authority, the State launches into a tortured 14-page merit discussion of the second prong of the *Lovasco* test. *See*, Br. in Opp. at pp. 17-31. There, the State, in error, interprets this Court's decision in *United States v. Marion*, 404 U.S. 307 (1971), which dealt with the Sixth Amendment right to a speedy trial, as controlling this case, which instead deals with the Fifth Amendment

right to due process of law. *See*, Br. in Opp. at pp. 18-19.

Finally, unlike petitioner's Statement, which is meticulously supported with record citation to the lower court's findings of fact, *see* Pet. at pp. 2-18, the state of Ohio presents a "Counterstatement" of the case unsupported by any citations to the opinion below, and unsupported by any other essential record materials in an appendix. *See*, Br. in Opp. at pp. 2-12.[1]

Stripped to its essence, the Brief in Opposition presents only two arguments material to the certiorari determination – a suggestion of procedural bar and harmless error. As we explain below, these fact-driven arguments are meritless. But they do underscore why this is the right case to clarify the first prong of the *Lovasco* test.

A. Father Robinson's due process claim is properly before this Court.

Conceding that the question presented in this case was afforded "a full review on appeal," the State implies that the due process claim nevertheless was not preserved at the trial level. *See*, Br. in Opp. at p. 17. This claim is without merit.

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[1] The State's accusations that petitioner has misstated the record are themselves unsupported by the record, and are otherwise unworthy of a further reply.

This Court recently addressed and settled the procedure for raising a federal claim in a state-court proceeding. In *Baldwin v. Reese*[2] the Court advised that a "litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief, for example, by citing in conjunction with the claim the federal source of law on which he relies or . . . by simply labeling the claim 'federal.'" While the issue in *Baldwin* arose in the habeas context, the same rule of law applies to direct appeals.[3]

As we stated in the Petition, *see* p. 17 n. 11, Father Robinson's lawyers asked the trial court to dismiss the indictment, due to the loss of evidence in a pre-trial motion. In their motion and supporting brief, counsel requested that the court dismiss the charges because "defendant's due process rights have been violated." *See*, Pet. App. at B-4. While trial counsel ineptly relied upon the wrong line of due process cases, *see id.* at B-6, the factual basis for the motion was that exculpatory evidence, unavailable elsewhere, was lost due to the passage of time. Nothing more was necessary to present the federal claim in the first instance.

The trial court's treatment of the motion and the appellate court's review further demonstrate that this issue was properly preserved. The trial court

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[2] 541 U.S. 27, 32 (2004).

[3] *Howell v. Mississippi*, 543 U.S. 440, 442 (2005).

conducted an evidentiary hearing on the due process claim, and denied petitioner's request to dismiss the indictment, citing an Ohio case interpreting *Lovasco*. *See*, Pet. at p. 17, *see also*, Pet. App. at B-5. On direct appeal petitioner assigned the due process question as error. *Id.*, A-47 at ¶ 108. And he maintained that the claim was preserved, but ineffectively articulated by trial counsel. *Id.*, at ¶ 109. There, the State argued waiver. *Id.*, A-48, 49 at ¶ 117. But the Ohio appellate court rejected the waiver argument, and squarely addressed the *Lovasco* claim on its merits. *Id.*

Furthermore, the State does not claim that the presentation below violated any state procedural rules, and the judgment below contains no "plain statement"[4] that it relied upon anything but this Court's opinion in *Lovasco*. Therefore, the question of when, in *Lovasco's* terms, a pre-prosecution delay claim is "ripe for adjudication" is properly before this Court.

B. Constitutional prejudice is manifest when the passage of time and the consequent loss of exculpatory evidence contribute to a conviction.

Long on adjectives and short on nouns, the Brief in Opposition attempts to convince this Court that the prejudice suffered in this case was harmless, because the evidence of guilt was "very strong" and

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[4] *Cf. Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

because some of the lost evidence made its way to the jury in the form of hearsay. *See*, Br. in Opp. at pp. 31-36. The State's "no prejudice" analysis fails for two straightforward reasons. *First*, it misinterprets the harmless error standard.[5] *Second*, it does not address the inherent difference between hearsay declarations and live testimony or the relative probative impact of each upon a jury.

1. The State's Brief in Opposition misinterprets the harmless error standard.

The Brief in Opposition goes to great lengths to discuss only the incriminating evidence, without any citation to the lower court's factual findings, and it construes that evidence in a light most favorable to the State. *See*, Br. in Opp. at pp. 2-12. But constitutional harmless error analysis requires a more searching analysis than that. The question this Court must answer, in determining if harmless error is present, is whether "there is a reasonable possibility that the [error] complained of" – in this case, the prejudice caused by the 24-year delay in prosecution – "might have contributed to the conviction."[6] Indeed, "to say that an error did not contribute to the verdict . . . is to find that error unimportant in relation to

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[5] *See Chapman v. California*, 386 U.S. 18 (1967); *Crane v. Kentucky*, 476 U.S. 683 (1986) (an error is harmless if it is established beyond a reasonable doubt that it did not contribute to the verdict).

[6] *Yates v. Evatt*, 500 U.S. 391, 403 (1991).

everything else the jury considered on the issue in question."[7]

Accordingly, under the State's analysis, the question is whether the lost or destroyed evidence in this case was unimportant in relation to everything else the jury considered. Given that the cornerstones of the State's case were a second autopsy of a decomposed body that occurred 24 years after-the-fact, and negative inferences about the Catholic faith and the occult, *see* Pet. at pp. 12-15, the answer to this question is a resounding "no."

2. The lost or destroyed evidence in this case significantly contributed to Father Robinson's conviction.

The Brief in Opposition urges the Court to deny the writ, on the basis that Father Robinson suffered no constitutional prejudice, because his lawyers presented 12 pieces of paper to the jury. In essence, the State claims that use of hearsay declarations are sufficient to replace live expert testimony, live occurrence witness testimony, and key forensic and physical evidence. But nowhere does the State discuss the inherent difference between hearsay declarations and live testimony or the relative probative impact of each upon a jury.

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[7] *Id.* at 403.

As we stated in the Petition, the State's case against Father Robinson was entirely circumstantial, and the only issue at trial was the identity of the murderer. Suffice it to say, that Father Robinson's guilt or innocence turned upon his ability to rebut the four key components of the State's theory of identity: Father Robinson's letter opener as the murder weapon, soft ligature strangulation, a time of death before 7:30 a.m., and an intentional occult-like sexual assault. *See*, Pet. at pp. 4-7.

Here, Dr. Fazekas' live expert testimony, the stab wounds and sample scissors she examined in 1980 and Ms. Warren's live testimony were much more important to Father Robinson's defense than the hearsay declarations that were before the jury. Due to the absence of this live testimony, the jury had no means to determine the credibility of Dr. Fazekas or Ms. Warren or the credibility of their 1980 hearsay declarations under the court's standard jury instruction. What is more, the jury could not evaluate the reliability of the State's witnesses who offered evidence that contradicted what the dead witnesses would have said. And because of the deaths of Fazekas and Warren, the decomposition of the victim's body, and the loss of the sample scissors Fazekas examined in 1980, there was no way for the defense to independently verify the 26 year-old hearsay declarations at trial in 2006.

Making matters much worse, once the State impeached the lost evidence at trial and thus, put its reliability directly in issue, rehabilitation was a

factual impossibility. Indeed, the very fact that the defense was forced to rely upon testimonial hearsay, *see* Pet. at pp. 15-16, created an unbelievable reverse *Crawford* scenario,[8] where the State could contradict the hearsay declarations without any fear of rehabilitation. Consequently, the 12-page hearsay defense presented in this case was neither meaningful nor complete in a constitutional sense. Indeed, the jury could only speculate about the exculpatory value of the missing evidence.

Underscoring the grave danger of jury speculation here, and the need for Dr. Fazekas[9] and Ms. Warren's live testimony at trial, one need only look to the opinion below. There, the Ohio appellate court viewed Dr. Fazekas' opinions as not "necessarily exculpatory," *see* Pet. App. A-56 at ¶ 134, and Ms. Warren's time of death account as "a matter of debate." *Id.*, A-8, A-9 at fn. 4. While this type of speculation is what *Lovasco* forbids a defendant to engage in, it does explain why reliance upon hearsay, 26 years after-the-fact, is constitutionally dangerous. Surely, if three seasoned appellate judges speculated about Dr. Fazekas' 1980 post-mortem examination of

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[8] *Cf. Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. ___ (2009).

[9] *Cf. United States v. Graham*, 128 F.3d 372 (6th Cir. 1997) (recognizing the significance of the live testimony of a deceased deputy coroner, where the Coroner's trial testimony is presented by a person who did not examine the body, and finding "substantial prejudice" in a Sixth Amendment case).

the body and the forensic and physical evidence she deemed material to her analysis, and further speculated about Ms. Warren's contemporary time of death account, then it is just as reasonable to conclude that the jury engaged in the same guesswork. If so, then expert witness testimony, occurrence witness testimony, forensic evidence, and physical evidence that undermined the State's weak circumstantial case, *see* Pet. at p. 11, was without meaning.

Therefore, the prejudice that resulted from the near quarter of a century of delayed justice here cannot be "harmless" beyond a reasonable doubt.

C. This record provides the Court with an opportunity to establish a meaningful constitutional standard.

If the record in this case makes anything clear, it is that Father Robinson had no choice but to rely upon hearsay evidence in order to attempt to prove his innocence. *See*, Pet. at pp. 15-16. Indeed, the Brief in Opposition relies heavily upon the fact that some of the lost evidence made its way to the jury in the form of hearsay. *See*, Br. in Opp. at pp. 1, 16, 35-36. But the very fact that favorable hearsay is of record, will require this Court to adopt the type of probative value standard necessary to distinguish between "actual prejudice," which triggers the Due Process Clause, and speculative prejudice, which does not. And here, unlike the situation faced by the *Lovasco* Court, that standard and the "prejudice at trial"

requirement of *Lovasco* are capable of ready determination from a trial record and not a pre-trial record. Indeed, the introduction of hearsay, which differentiates this record from all others, establishes its cert-worthiness.

CONCLUSION

The question of when a due process claim is ripe for adjudication, under *United States v. Lovasco*, 431 U.S. 783 (1977), has not been, but should be, settled by this Court. The confusion below, the due process interests that this case exemplifies, and the contemporary recurring litigation impact of "cold-case" prosecutions, warrant this Court's answer.

Accordingly, we urge the Court to grant certiorari and squarely confront the meaning and scope of *Lovasco*. Indeed, it seems irresponsible to let the chaos continue.

Respectfully submitted,

RICHARD M. KERGER
33 S. Michigan St.
Suite 100
Toledo, Ohio 43604
419.255.5990

JOHN P. DONAHUE
Counsel of Record
Post Office Box 526
Perrysburg, Ohio 43552
419.874.4604

Counsel for Petitioner Gerald Robinson

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